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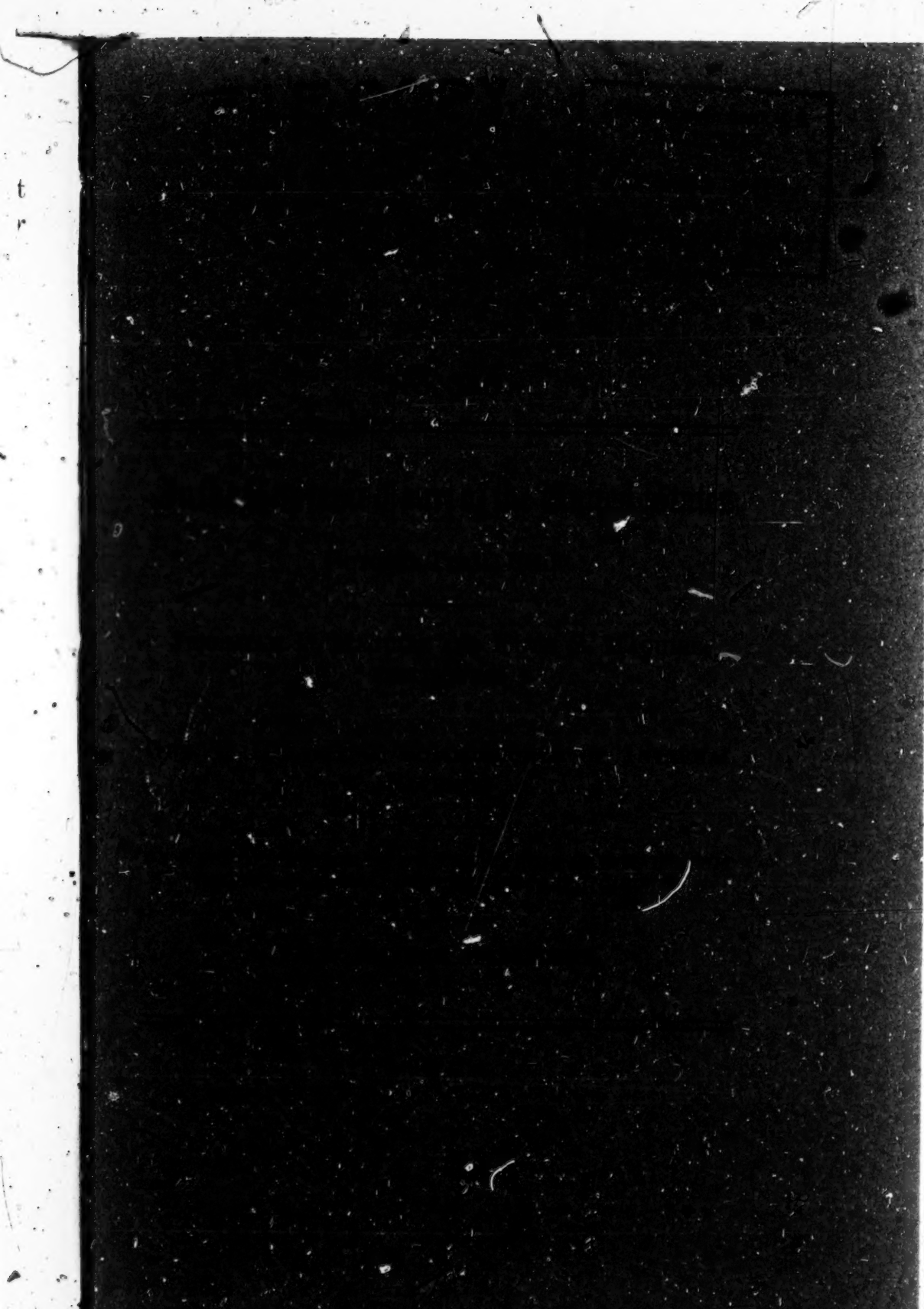

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 346

JEREMIAH D. MAGUIRE AND RUTH S. MAGUIRE, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The memorandum findings of fact and opinion of the Board of Tax Appeals (R. 31–47) are not reported. The opinion of the Circuit Court of Appeals (R. 68–75) is reported in 111 F. (2d) 843.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 5, 1940 (R. 75). On March 15, 1940, the Circuit Court of Appeals entered an order (R. 79) extending the petitioners' time within which to file a petition for rehearing until

further order of the court, but in any event until April 5, 1940. On April 4, 1940, the Circuit Court of Appeals entered an order (R. 83) extending petitioners' time to file a petition for rehearing until fifteen days after April 5, 1940. On April 17, 1940, they filed a petition for rehearing (R. 83), which was denied May 21, 1940 (R. 84). On June 12, 1940, the petitioners moved for permission to file a petition for reconsideration of their petition for rehearing (R. 88), which was denied on July 10, 1940 (R. 93). The petition for a writ of certiorari was filed August 19, 1940, and granted October 14, 1940. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Pursuant to a testamentary trust established under the will of petitioner's [1] father, petitioner's share was distributed to her 20 years after her father's death. She thus received not only securities formerly owned by the decedent but also other securities purchased by the trustees. During the year 1930, petitioner sold securities of both groups, and the questions presented relate to the proper

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[1] Petitioners are husband and wife who filed a joint return (R. 3). The income involved is that of Ruth S. Maguire. Wherever the word "petitioner" is used in this brief it is intended to mean Ruth S. Maguire, unless the context indicates otherwise.

basis for determining gain or loss upon these sales, namely:

(1) Whether, under Section 113 (a) (5) of the Revenue Act of 1928, the basis of the first group of securities is their value when received by the trustees from the decedent's estate, or their value at the date of delivery by the trustees to petitioner; and

(2) Whether the basis of the second group of securities is their cost to the trustees or their value at the date of delivery by the trustees to petitioner.[2]

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in Appendix A, *infra,* pp. 41–43.

STATEMENT

The facts as stipulated (R. 14–30, 64–65) and as found by the Board of Tax Appeals (R. 32–36) may be summarized as follows:

Gustavus Swift died March 29, 1903 (R. 32). His will (R. 22–28), after certain specific bequests,

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[2] Section 113 (b) of the Revenue Act of 1928 provides that the basis for determining gain or loss from the sale of property acquired before March 1, 1913, shall be the value specified in Section 113 (a), or the fair market value of the property on March 1, 1913, whichever is greater. Since there is no dispute as to this proviso it is not taken into account in the Questions Presented and is ignored throughout this brief. Likewise no mention is made of the corresponding provisions of other revenue acts.

devised the residue of his property in trust, and directed the trustees, not less than ten nor more than twenty years after the testator's death, to make final distribution of the corpus as follows (R. 25–26):

> * * * to my wife the one-third part thereof, the balance to be equally divided among my children, share and share alike, and should my wife not be living at the time of such distribution, then the same shall be divided equally among my children, share and share alike, the descendants of any deceased children in such distribution to take the proportion of their deceased parent, * * *.

On December 11, 1905, the Probate Court of Cook County entered its order (R. 29–30) discharging the executors of the estate of Gustavus Swift and approving their final account. Pursuant to this order the executors on that date turned over the balance of the estate to themselves as trustees (R. 33).

This case is concerned with the basis for determining gain or loss as to certain of the securities thus received by the testamentary trustees from the Swift estate, and as to other securities thereafter purchased by the trustees. In 1923 the trust was terminated and all of the assets then held by the trustees were turned over in kind to the eight children of the testator then surviving; i. e., petitioner Ruth S. Maguire and her brothers

and sisters (R. 33–35). These beneficiaries placed the securities in two *inter vivos* trusts which they created. Some were sold by the trustees of the new trusts in 1930, and others were sold in 1929 but part of the sales price was paid in 1930 (R. 34–35). It has been stipulated that the beneficiaries are taxable as though the sales were made by them individually (R. 19, 20, 21, 64–65).

The parties have stipulated the amount of gain which is taxable if the proper cost basis of the securities sold is their fair market value at the time of termination of the testamentary trust in 1923 (R. 19, 20). They have also stipulated the amount of gain which is taxable if the Commissioner's position is sustained on both points; that is, if the proper basis for securities originally owned by the decedent is their fair market value when distributed to the testamentary trustees in 1905, and if the proper basis for the securities subsequently purchased by the trustees is their cost to the trustees; with the proviso as to both classes of property that the 1913 value governs as to property acquired by the trustees before that date in instances where it exceeds the basis otherwise determined (R. 19–22, 64–65).

The Board of Tax Appeals held that the beneficiaries' basis is the value of the assets at the time of termination of the testamentary trust and delivery to the beneficiaries, i. e., March 29, 1923 (R. 39). The Circuit Court of Appeals reversed

the Board and sustained in full the contentions of the Commissioner (R. 68–75).

SUMMARY OF ARGUMENT

The court below was correct in holding that, under subdivision (5) of Section 113 (a) of the Revenue Act of 1928, petitioner's basis for determining gain or loss upon the sale of personal property which was owned by her father at his death and which came to her by general bequest through the testamentary trustees, is its value at the time of the distribution by the executors to themselves as trustees; and that petitioner's basis for property purchased by the testamentary trustees is governed not by subdivision (5) of Section 113 (a) but by the general provision of that section, under which the basis is cost to the trustees.

The historical development of the statutory provisions dealing with the basis for property acquired by gift or inheritance reveals a general plan to leave the value of such property, as of the date of gift or of the decedent's death, free from income tax in the beneficiary's hands, and to use that value as the beneficiary's basis for determining gain or loss on a subsequent disposition. This scheme gives effect for income tax purposes to all changes in value of property following a gift or transmission at death. We think that with the exception of Section 113 (a) (5) of the Revenue Acts of 1928 and 1932 there has been no legislative departure from this principle.

I. Property owned by the decedent at his death and passing to a beneficiary through a testamentary trust is acquired by the beneficiary by will. Section 113 (a) (5) of the Revenue Act of 1928 fixes as the basis for personal property acquired "by will," other than by specific bequest, its value "at the time of the distribution to the taxpayer."

No radical departure from the value-at-death rule was intended by this provision. The committee reports indicate that Congress intended to distinguish between those cases in which property vests in the beneficiary immediately upon death, such as realty, or is definitely marked as the legatee's at the date of death, such as specific bequests, and those in which the legatee must await administration and satisfaction of creditors before he can identify his property as separate from the funds of the estate. The legislative purpose is accordingly observed by construing the words "the time of the distribution to the taxpayer" as contemplating the time when distribution is made out of the estate. Such a construction does no violence to these words, since it is reasonable to conclude that for the purpose of this section a beneficiary receives distribution of property when distribution is made to the trustee to be held for his benefit.

To construe the words as referring to a distribution at the termination of a testamentary trust would create a period, frequently of lengthy duration, during which changes in value would be with-

out tax effect. Similarly, it would enable trustees to sell trust property or distribute it in kind, according to which course would secure an advantageous basis for determining gain or loss.

II. Subdivision 5 of Section 113 (a) of the Revenue Act of 1928, dealing with property acquired "by will," does not cover property purchased by testamentary trustees following the decedent's death and distributed to the beneficiary. While we concede in view of the statements in the committee reports that subdivision (5) was intended to embrace purchases by an executor or an administrator, it should not be extended by implication to include property purchased by trustees.

To do so would derogate from the general scheme of the revenue acts and the sound tax principle that any gain or loss accruing after the date of death is to be given tax effect. Further, if the trustees themselves sold property which they had purchased, the basis would necessarily be cost. To hold that a different basis prevails for the property in the hands of the beneficiaries would enable trustees either to sell the property or to distribute it in kind as would be advantageous for tax purposes. Such a result is plainly undersirable, and is not required by the terms of Section 113 (a) (5). Property purchased by trustees is not acquired "by will" within the ordinary sense of that phrase, nor does the language of the committee reports require such an extension. There may be some

basis for considering property purchased by an executor as having been transmitted to the beneficiary at death or acquired by will, on the ground that until distribution by the decedent's estate the basic testamentary disposition is in suspense. But such a theory is inapplicable to property purchased by a testamentary trustee.

Furthermore, the 1928 and 1932 Acts should be interpreted in harmony with prior and subsequent acts, as nearly as may be, and property purchased by a fiduciary is not acquired by bequest, devise, or inheritance within the meaning of the revenue acts prior to the 1928 Act and subsequent to the 1932 Act, and is not acquired by gift within the meaning of any of the revenue acts: the beneficiary's basis for such property is cost to the fiduciary.

ARGUMENT

Introductory.—The controversy in this case is as to the correct method of determining the gain or loss realized by the petitioner Ruth Swift Maguire upon the sale by her of certain assets which she had received from a testamentary trust created by her father's will. Some of these assets had been owned by her father at his death and were turned over by his executors to themselves as testamentary trustees; others were purchased by the testamentary trustees with trust funds. The dispute here turns on the proper interpreta-

tion and application of Section 113 (a) of the Revenue Act of 1928 (Appendix A, *infra*, p. 41) prescribing the basis to be used in ascertaining gain or loss upon the sale of property. Those provisions can, however, be better understood if their origin and relation to comparable provisions in other revenue acts are first briefly explained.

The revenue acts before that of 1918 contained no very definite provisions as to the basis to be employed in determining the gain or loss upon the disposition of property. See Section 2 (c) of the Revenue Act of 1916. This omission was partly supplied, however, under the 1916 Act by Treasury Regulations 33, revised, which provided that the appraised value at the time of the decedent's death was the basis for determining gain upon the sale of property acquired by inheritance (Art. 4, par. 44), and that the fair market value of stocks acquired by gift was the basis for computing gain derived or loss sustained from the sale thereof (Art. 4, par. 41).

The Revenue Act of 1918, c. 18, 40 Stat. 1057, contained a general provision (Sec. 202 (a)) that for the purpose of ascertaining gain or loss from the sale or other disposition of property the basis should be the cost of the property. There were no express exceptions for property acquired by gift or devolving at death. However, Article 1562 of Treasury Regulations 45, interpreting this Act, provided that the basis for property acquired by

gift, bequest, devise, or descent should be the fair market value at the date of acquisition and, in effect, that value at date of acquisition of property acquired by bequest, devise, or descent meant appraised value at the decedent's death. The Article refers to Sec. 213 (b) (3) of the 1918 Act, which excludes from taxable income the value of property acquired by gift, bequest, devise, or descent, and it is evident that that statutory provision formed the basis for the regulation's departure from the basis of cost rule stated in Sec. 202 (a).

In the Revenue Act of 1921, c. 136, 42 Stat. 227, there appeared, for the first time, as exceptions to the rule that cost shall constitute the basis, special provisions defining the basis of inheritance and gift property. The basis for property obtained by bequest, devise, or inheritance, and by gift on or before December 31, 1920, was defined as the fair market value of the property "at the time of such acquisition" (Sec. 202 (a) (2) and (3)) and the Committee reports indicate that this was a continuation of the existing law as stated in the Treasury Regulations. But for property acquired by gift after December 31, 1920, the donee was given the basis of the donor or of the last preceding owner by whom it was not acquired by gift, the Committee reports stating that this departure from the existing rule was made to prevent evasion: under the regulations interpreting the 1918

Act, an owner of property the value of which had increased could give it to a member of his family, who could then sell it without incurring tax liability for the increase in value of the property while in the donor's hands.[3]

The Revenue Act of 1924, c. 234, 43 Stat. 253, continued unchanged the provisions of the Revenue Act of 1921 with respect to property acquired by bequest, devise, or inheritance (Sec. 204 (a) (2), (4), and (5)). It added (by Sec. 204 (a) (3) and (4)) to the existing gift provisions similar provisions relating to property transferred in trust *inter vivos*.[4] The provisions of the 1924 Act relative to the basis for property acquired by gift, bequest, devise, or inheritance were reenacted without change in the Revenue Act of 1926 (c. 27, 44 Stat. 9, Sec. 204 (a) (2), (3), (4), and (5)).

Thus "the time of * * * acquisition" was the critical date for valuing property passing at

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[3] H. Rep. No. 350, 67th Cong., 1st Sess., p. 9. Cf. S. Rep. No. 275, 67th Cong., 1st Sess., pp. 10–11; H. Conference Rep. No. 486, 67th Cong., 1st Sess., p. 16.

[4] It is not entirely clear what, if anything, the new provisions added, except as to transfers in trust for a partial or inadequate consideration, since the existing gift provisions were applicable to gifts in trust, as well as to ordinary gifts. *Helvering* v. *New York Trust Co.*, 292 U. S. 455. The Committee reports shed little light on the subject. See S. Rep. No. 398, 68th Cong., 1st Sess., p. 17 (1939–1 Cum. Bull. (Part 2), 266, 278); H. Rep. No. 179, 68th Cong., 1st Sess., p. 16 (1939–1 Cum. Bull. (Part 2), 241, 253).

death, under the 1921, 1924, and 1926 Acts, and under the regulations interpreting the 1918 Act. Considerable litigation arose as to the meaning of this phrase; as a consequence the statutory provisions were amended in the Revenue Act of 1928.[5] It is with the new provisions thus introduced in 1928 that we are here concerned.

Section 113 (a) of the Revenue Act of 1928 (Appendix A, *infra*, p. 41) provides that the basis for determining the gain or loss from the sale of property shall be the cost of such property, except as different bases are therein specified for particular types of property. The exceptions with respect to property acquired by gift or transfer in trust *inter vivos*, contained in subdivisions (2), (3), and (4), are substantially the same as those contained in the 1924 and 1926 Acts. Subdivision (5), with which we are here particularly concerned, provides for a basis of value at the date of death for realty acquired by devise or intestacy, personalty acquired by specific bequest, and property acquired by the decedent's estate from the decedent, and that "In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the dis-

[5] H. Rep. No. 2, 70th Cong., 1st Sess., p. 18; S. Rep. No. 960, 70th Cong., 1st Sess., p. 26. The Senate Report, so far as pertinent to this case, is set out in Appendix B.

tribution to the taxpayer." The provisions of the 1928 Act were repeated in the 1932 Act.

In the meantime, however, the decision of this Court in *Brewster* v. *Gage*, 280 U. S. 327 (1930), had cleared up much of the uncertainty under the 1918–1926 Acts. That case involved personal property acquired by a residuary legatee and sold in 1921 and 1922, and was decided under the Revenue Acts of 1918 and 1921. As has been seen, the latter Act, and the regulations under the former Act, specified value at the time of "acquisition" as the basis for property acquired by bequest, devise, or inheritance. This Court held that the time of "acquisition" was the date of the decedent's death, and not the date the executors distributed the property to the legatee.

Since *Brewster* v. *Gage* thus eliminated much of the controversy as to the meaning of "the time of * * * acquisition" in the 1926 and earlier acts, Congress, in Section 113 (a) (5) of the Revenue Act of 1934, reverted to the form of the 1926 Act, that is, that property acquired by bequest, devise, or inheritance shall take as its basis its fair market value at the time of its acquisition.[6] And the 1926 terminology has since been preserved in Section 113 (a) (5) of the Revenue Acts of 1936 and 1938 and of the Internal Revenue Code.[7]

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[6] See S. Rep. No. 558, 73d Cong., 2d Sess., pp. 34–35; H. Rep. No. 704, 73d Cong., 2d Sess., p. 28.

[7] The Treasury Regulations with respect to 1926 and earlier and 1934 and later Acts have consistently provided

The statutory provisions with which we are here concerned were thus in effect only temporarily, in the 1928 and 1932 Acts. The foregoing summary likewise shows that those Acts depart to some extent from the theory which has otherwise obtained as to the treatment of gains and losses realized on the sale of property acquired by bequest, devise, inheritance, or gift. That theory is, basically, that the beneficiary should not be required to pay income tax upon the value of such gift or inheritance property; that to use the usual basis rule of cost for such property would have that result, since the beneficiary's cost would be zero; hence the beneficiary is given as basis the value of the property when the gift was made, or the inheritance transmitted by death, with the exception, to prevent evasion, that property given *inter vivos* after 1920 takes the donor's cost as basis in the donee's hands. Thus

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that the date of the decedent's death is the time of acquisition specified by the statutes. Regulations 33 (Revised), par. 44 (1916 Act); Regulations 45, Art. 1562 (1918 Act); Regulations 62, Art. 1563 (1921 Act); Regulations 65 and 69, Art. 1594 (1924 and 1926 Acts); Regulations 86, 94, and 101, Art. 113 (a) (5)–1 (1934, 1936, and 1938 Acts); Regulations 103, Sec. 19.113 (a) (5)–1 (Internal Revenue Code). Cf. *Brewster* v. *Gage*, 280 U. S. at p. 336.

The 1934, 1936, and 1938 Acts, and the Internal Revenue Code, continued without change here material the provisions of the earlier acts with respect to the basis for property acquired by gift or transfer in trust *inter vivos*, with the exception that, in Section 113 (a) (2) of the later acts and Code, loss realized upon the sale of property acquired by gift after 1920 was limited to the difference between the sale price, and the donor's basis or value at date of gift, whichever was lower.

the scheme is to leave no time gaps following the date of gift or death during which fluctuations in value of property are immunized from tax effect; stated another way, there are no gaps in the continuity of basis following the date of gift or death; in fact, there is no gap in such continuity even prior to the date of a gift made since 1920.

That Section 113 (a) (5) of the 1928 and 1932 Acts effected some departure from the stated principle is conceded. It is with the extent of that departure that we are here concerned. We will contend Congress could not have intended a material departure.

I

THE BASIS FOR PROPERTY OWNED BY PETITIONER'S FATHER AND PASSING TO HER THROUGH THE EXECUTORS AND TESTAMENTARY TRUSTEES IS ITS VALUE WHEN DISTRIBUTED BY THE EXECUTORS TO THE TRUSTEES

We are here concerned with property which petitioner's father owned at his death and which was turned over by his executors to themselves as the testamentary trustees and was eventually delivered by the trustees to petitioner. We agree with petitioner that her basis for such property is its fair market value "at the time of the distribution to the taxpayer" as that phrase is used in the third sentence of subdivision (5) of Section 113 (a) of the Revenue Act of 1928. The disagreement is as to the meaning of this phrase. We contend, and the court below held, that it refers to the date of

distribution by the decedent's estate, while petitioner contends that it refers to the delivery of the property into her hands by the testamentary trustees.

If the trustees had themselves sold the property, it is agreed both by petitioner and the Government that their basis would have been the value of the property when distributed to them by the executors. *Commissioner* v. *Taft*, 101 F. (2d) 1007 (C. C. A. 6th), affirming 34 B. T. A. 603. Cf. *Helvering* v. *New York Trust Co.*, 292 U. S. 455. In such a case the date of the distribution by the executors would be the "time of the distribution to the taxpayer." Petitioner contends, however, because the trustees did not sell the property, but distributed it in kind to the beneficiaries, that the basis for the property in the hands of the beneficiaries is different from what it was in the hands of the trustees, and is its value when distributed to the beneficiaries. Petitioner urges, in other words, that the "time of the distribution to the taxpayer" referred to in the statute shifts from the date of distribution by the executors to the date of distribution by the trustees, if the latter distribute in kind, or perhaps that there are two times of distribution (and more if there are successive testamentary trusts), and that the date of the last distribution is the decisive one under the statute. Petitioner asserts that this construction is required by the use of the word "taxpayer," for the reason that that term can only refer to the person or other

tax entity who happens to have sold the property and whose tax liability is in question. We contend that the "time of the distribution to the taxpayer" is the date of distribution by the executors, and that it so remains whether or not the testamentary trustees sell the property or distribute it in kind. We think the word "taxpayer" refers to the person or other taxable entity to whom the property is distributed upon termination of the administration of the decedent's estate.

At the outset, it should be noted that petitioner's construction of subdivision (5) imputes a wide avenue for tax avoidance under the 1928 and 1932 Acts. For if property distributed in kind by trustees takes as its basis its value when distributed by the trustees, instead of the basis it had in the hands of the trustees—that is, its value when distributed by the executors—trustees are enabled either to sell the property or to distribute it in kind as would be advantageous for tax purposes. How wide the spread between the two bases might be is suggested by the long duration of the trust in the present case.

It is true that under any construction of subdivision (5) of Section 113 (a) of the Revenue Acts of 1928 and 1932 there is a possibility of tax avoidance, in that the basis for property sold by executors in the course of administration is its value at the decedent's death, while property distributed by executors takes as its basis its value when distrib-

uted. This loophole was noted in the Senate Committee Report on the 1934 Act, which restored subdivision (5) to the form it had had in 1926 and before. S. Rep. No. 558, 73d Cong., 2d Sess., pp. 34–35. This opportunity for tax avoidance is relatively insignificant, however, since the period of administration is ordinarily short, at least as compared with the duration of testamentary trusts. And if the Senate Committee had thought that a testamentary trustee, after many years of increase or decrease in value during the life of the trust, possessed a similar power of manuipulation, to sell before distribution or to distribute in kind as seemed tax wise, it probably would have referred to this much more sizeable loophole. Particularly so, when it is remembered that as early as 1921 the donee of a gift *inter vivos* was given the donor's basis to prevent the use of a less facile method of tax manipulation. See *supra,* p. 11–12.

Similarly, while some inequality of treatment results from using, as the 1928 and 1932 Acts require, a value at death basis for realty and a basis of value at distribution of the decedent's estate for personalty acquired by general bequest and intestacy, nevertheless the disparity ordinarily is not marked, since distribution usually follows death within a reasonable time. On the other hand, realty and personalty may be held in testamentary trusts for many years following the decedent's death and the closing of his estate, as happened here. The dis-

parity between the treatment of a remainderman of realty and a remainderman of personalty would become very great, if the latter were given a basis of value at time of distribution by the trust, instead of distribution by the executor.

Petitioner's construction of subdivision (5) is further objectionable in that it departs widely from the principle that upon the sale of property acquired by gift, bequest, devise or inheritance, tax effect is to be given to any changes in value which have occurred since the date of the gift or of the decedent's death. This principle, it is shown, *supra*, pp. 10–16, has generally been followed in the revenue acts, and it is obviously a sound principle of tax administration. We concede that the 1928 and 1932 Acts departed from this principle to some extent, by providing, in substance, that in the case of personal property passing otherwise than by specific bequest no tax effect was to be given to changes in value during the period of the administration of the estate. That limited departure was, however, relatively unimportant because the period of administration is not usually long. The departure which would be effected by petitioner's construction of the acts would be far more extensive. We submit that no such construction should be accepted unless it is clearly indicated by the legislative history. The legislative history does not support petitioner's construction: if anything it shows

that "the time of the distribution to the taxpayer" refers only to the distribution by the executors.

As introduced in the House, the bill which became the Revenue Act of 1928 (H. R. 1, 70th Cong., 1st Sess.) provided, in Section 113 (a) (5), that the basis for all property acquired by bequest, devise, or inheritance should be the value of the property at the date of the decedent's death.[8] The Senate Committee changed the language of the House bill into the form in which it was finally enacted. The Senate Committee Report (Appendix B, *infra*, pp. 45–47) states that the decision in *McKinney* v. *United States*, 62 C. Cls. 180, has caused confusion "as to the basis on which an executor must determine gain or loss on the sale by him of property of the estate."[9] The report then declares that the House bill is inadequate to take care of some situations, mentioning specifically a purchase by executors followed by distribution in kind to the beneficiaries. The report then outlines the terms of Section 113 (a) (5) as the Senate

[8] The House Committee report stated: "Under existing law, the basis * * * is the value at the date of 'Acquisition,' which is indefinite and has given rise to controversy." H. Rep. No. 2, 70th Cong., 1st Sess., p. 18.

[9] The *McKinney* case held that an executor did not realize gain when he sold property for more than its appraised value at the decedent's death but for less than its appraised value in the decedent's hands on March 1, 1913. The decision went on the ground that the executor stood in the decedent's shoes.

Committee has revised it. It states that the date of death rule applies to personalty acquired by specific bequest and to realty acquired by general or specific devise or intestacy, and declares that "In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death . * * *." After noting that the same rule is applicable in the case of all property transmitted by the decedent and sold by the executor, the report goes on to say that in all other cases the basis is the value of the property at the time of the distribution to the taxpayer. It adds: "The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary." The House Conference Report is substantially to the same effect. H. Conf. Rep. No. 1882, 70th Cong., 1st Sess., p. 14.

Thus the difference in treatment accorded to realty and specific bequests of personalty on the one hand, and to general bequests and intestate devolution of personalty on the other, appears to rest upon a distinction between those cases in which property either vests in the heir or devisee at death, such as realty, or is definitely marked at the time of death as that of the legatee, such as personalty which is the subject of specific bequest,

and those cases in which the legatee must normally await administration and satisfaction of creditors before he can with any degree of certainty identify the property as his own, separate from the funds of the estate.[10]

If this is the correct explanation of the legislative purpose in enacting Section 113 (a) (5), that purpose is served by construing the words "at the time of the distribution to the taxpayer" as signifying the time when the distribution is made out of the estate. At that time the property which remains for the legatees after satisfaction of the debts is identified and distributed to the legatees or for their benefit.

Realistically, it is plain, there was no conscious Congressional intention with respect to the problems here presented: The committee reports on the 1928 Act show a preoccupation with the decedent's death, or the administration of his estate, and not with subsequent transmissions of property. And, as already shown, this same preoccupation is found in the report of the Senate Committee on the 1934

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[10] This classification corresponds to the usual order of sale of the decedent's assets to pay his debts. Generally speaking, personalty is invaded before realty, which can only be reached by court order, and general bequests are invaded before specific ones. In case of intestacy the decedent's personalty, and in case of a will his residual personal estate, are the primary funds for the payment of his debts. Woerner, *The American Law of Administration* (3d Ed.). Vol. 3, Sec. 489 *et seq.*, pp. 1705 *et seq.*

Act, when subdivision (5) was restored to the form it had in 1926 and before. See *supra*, p. 19.

Section 113 (b) likewise points to the conclusion that petitioner's basis for the property in question is its value on the date the executors turned it over to themselves as trustees. Section 113 (b) provides that the basis for property "acquired" before March 1, 1913, shall be the value on that date, if that is higher than the basis determined under Section 113 (a). The decedent in the present case died before March 1, 1913, and the property in question, whatever may be deemed to be "the time of the distribution to the taxpayer", was "acquired" by the petitioner at the decedent's death. *McFeely* v. *Commissioner*, 296 U. S. 102. Thus, if petitioner is right, comparison must be made between 1913 value and value in 1923, when the trust terminated. But this contruction gives a strange effect to Section 113 (b), which is intended to exempt from tax accruals in value before, and not after, March 1, 1913. On the other hand, if, as we contend, Section 113 (a) (5) refers to distribution by the decedent's estate, then in the case of a decedent dying before March 1, 1913, the distribution probably will have occurred before (as it did in the instant case), or in any event not long after, March 1, 1913.

In short, our position is that the distribution which Congress was thinking about in enacting Section 113 (a) (5) of the 1928 Act was the dis-

tribution by the decedent's estate; and that to refer Section 113 (a) (5) to the date of termination of a testamentary trust many years thereafter would be completely out of harmony with the general scheme of the revenue acts and would lead to unsound results.

Admittedly, the Bureau of Internal Revenue has not pursued a consistent construction of the phrase "the time of the distribution to the taxpayer" in Section 113 (a) (5) of the 1928 and 1932 Acts. Originally it took the view, which we now defend, that it means date of distribution by estate to trust and not date of delivery by trust to beneficiary. G. C. M. 6195, VIII–1 Cum. Bull. 99 (1929). In G. C. M. 11309, XII–1 Cum. Bull. 126 (1933), this stand was reversed, and it was held that the date of delivery by trust to beneficiary was intended. Subsequently, the Bureau again reversed its stand and readopted the construction we now urge. G. C. M. 14893, XIV–1 Cum. Bull. 202 (1935). As a result of the intermediate view, the point here involved was conceded by the Government in several cases. *Lane* v. *Corwin*, 63 F. (2d) 767 (C. C. A. 2d), certiorari denied, 290 U. S. 644; *Becker* v. *Anchor Realty & Investment Co.*, 71 F. (2d) 355 (C. C. A. 8th); *United States* v. *Van Nostrand*, 94 F. (2d) 510 (C. C. A. 1st); *Clyde* v. *Commissioner*, 32 B. T. A. 799.

In addition to the conflicting decisions now before this Court (*Commissioner* v. *Gambrill*, and re-

lated cases, Nos. 472-475, this Term) the question here presented was decided adversely to the Government's contention in *Commissioner* v. *Libbey*, 100 F. (2d) 458 (C. C. A. 1st), one judge dissenting. *Jenkins* v. *Smith*, 21 F. Supp. 433 (D. Conn.), reversed on other grounds, 99 F. (2d) 827 (C. C. A. 2d), is in the Government's favor. With reference to the *Libbey* decision, it may be said that the majority relied heavily upon their previous decision in *United States* v. *Van Nostrand, supra*, in which the Government had not contested the point. The taxpayer's contention (Br. 12) that the decision below conflicts in principle with *Haskell* v. *Commissioner*, 78 F. (2d) 869 (C. C. A. 3d), certiorari denied, 296 U. S. 652; *Williamson* v. *Commissioner*, 100 F. (2d) 735 (C. C. A. 6th), certiorari denied, 307 U. S. 623; and *Commissioner* v. *Taft*, 101 F. (2d) 1007 (C. C. A. 6th), is not well founded. In each of those cases the taxpayer had received distribution directly from the executors or administrators of the decedent's estate, and the date of that distribution was taken to be controlling.

II

THE BASIS FOR PROPERTY PURCHASED BY THE TRUSTEES AND DELIVERED TO PETITIONER IS ITS COST TO THE TRUSTEES

In the present case some of the property sold by petitioner had been brought by the testamentary trustees and delivered to her upon termination of the trust. Subdivision (5) of Section 113 (a) of

the Revenue Acts of 1928 and 1932 provides, as has been seen, for a basis of value at the date of death for realty acquired by devise or intestacy, personally acquired by specific bequest, and property acquired by the decedent's estate from the decedent, and that "In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer." The court below held that the quoted sentence was inapplicable to the property bought by the trustees, and that its basis was cost to the trustees, under the general provision of Section 113 (a). Petitioner contends that the quoted sentence applies, and requires the use of value at the date of delivery by the trustees.

The statutory provisions defining basis are concerned with the particular property sold. The cost of that particular property normally is used to ascertain the amount of any gain or loss, but under the provision here in question a different rule applies if the property was acquired "by will or by intestacy." Necessarily, therefore, the inquiry is whether the particular property sold was so acquired. The answer to that is not, we submit, always the same as the answer to whether the interest or estate of which the specific property sold was a part, was so acquired. In this case the interest of petitioner in her father's estate was held in trust following his death. The property purchased by

the trustees during this period was not a part of the original inheritance which passed from the decedent at this death, just as it would not have been a part of an original *inter vivos* gift. Therefore, it was not acquired "by will" within the usual sense of that phrase. On the other hand, it might in a limited or narrow sense be considered as acquired by will, since it came to petitioner because of the directions of her father's will.

In attempting to determine which of these constructions Congress intended, we think it important here, as under Point I, that petitioner's interpretation involves recognition of an avenue for tax avoidance If the trustees themselves sold property which they had purchased, the basis would necessarily be cost. To hold that a different basis prevails for the property in the hands of the beneficiaries would enable trustees either to sell the property or to distribute it in kind, as would be advantageous for tax purposes. Such a result is practically undesirable. Likewise, it is theoretically unsound. If the trustees themselves sold property they had purchased with funds of the estate, the transaction would be taxable as an ordinary one for profit, using a cost basis, just as it would if there had been no trust and the beneficiary had made both purchase and sale. To change the basis merely because the trustee distributes to the beneficiary before instead of after the sale, is to reach an anomalous result. Cf. *Brewster* v. *Gage*,

280 U. S. 327, 336. Moreover, the construction urged by petitioner would derogate from the general scheme of the revenue acts and the sound tax principle, discussed under Point I, that upon the sale of property acquired by gift, bequest, devise, or inheritance, tax effect is to be given to any changes in value which have occurred since the date of the gift or of the decedent's death.

It is true, as already acknowledged in Point I, that Section 113 (a) (5) of the 1928 and 1932 Acts does depart to some extent from this principle, and that it does embody some opportunity for tax avoidance. The phrase "at the time of the distribution to the taxpayer" expressly exempts from tax effect changes, during the period of administration, in the value of property which was owned by the decendent, if the property is distributed in kind by the executors. And while we think that purchases by executors would not be "property * * * acquired either by will or by intestacy" if those words stood alone, we concede, in view of the statements in the Senate and Conference Committee reports (see *supra*, pp. 21–22), that this provision was intended to include property purchased by an executor. But there is no reason, we submit, to extend it further by implication.

As has been seen, the Committee reports refer only to purchases by executors, and make no mention of purchases by testamentary trustees. Sub-

division (5), as the court below noted, is given the title *"Property transmitted at death."*[11] There may be some basis for including executors' purchases under a provision so headed, or for considering them as in a certain sense acquired by the legatees by will. Such property is acquired before administration of the testator's estate is completed; it forms part of the estate administered and distributed to the legatees. If not in a strict sense transmitted at death, it is nevertheless part of the property transmitted to those next in line to the decedent. Property purchased by a testamentary trustee is not of this character.

There is a further distinction between the two types of property. While the decedent's estate is in the course of administration, it is under the direct supervision of the probate court; the executor or administrator is an officer of the court and acts by authority of law. The purpose of the administration is to collect the decedent's assets, pay his debts, and distribute the remainder according to the decedent's will, or if there is no will, to those entitled under the inheritance laws. In performing these functions the law, through its instrumentality, the probate court and the officers thereof, is acting as it is presumed the decedent would have done could he have attended to

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[11] The title of an ambiguous statutory section may be taken into account in construing it. *Knowlton* v. *Moore*, 178 U. S. 41, 65.

his own affairs at the moment of his death. Woerner, *The American Law of Administration* (3d Ed.), Vol. 1, Secs. 9–10, pp. 8–10. But with the termination of the administration and the distribution of the estate by the executor or administrator, this active court management and supervision of the decedent's property and affairs ceases. A testamentary trustee is a legatee under the decedent's will and receives distribution like any other legatee.[12] True, the trustee holds the legacy in trust for others, but the trust is essentially no different from one created by an inter vivos instrument. The administration of both kinds of trusts is within the jurisdiction of the general courts of equity; except as the jurisdiction of probate courts has been extended in some states by statute, the administration of testamentary trusts is not within their competence. Woerner, *op. cit.*, Vol. 1, Sec. 151, pp. 517–519; Vol. 2, Sec. 229, p. 778.

Thus it is possible to consider that until distribution by the decedent's estate, basic testamentary disposition is in suspense; and that for tax purposes acquisition of personal property passing by general bequest or intestacy does not occur until that distribution is made. In this

[12] *Colton* v. *Colton*, 127 U. S. 300, 308–309; *Newcomb* v. *Williams*, 9 Met. (Mass.), 525; *Lockman* v. *Reilly*, 95 N. Y. 64, 72; *Matter of Logan*, 131 N. Y. 456; *Crawford* v. *Cemetery Ass'n*, 218 Ill. 399; *Weigel* v. *Commissioner*, 96 F. (2d) 387, 391 (C. C. A. 7th); 3 Bogert on Trusts and Trustees (1935 Ed.), Sec. 583.

light property purchased by the executor prior to that distribution is acquired by the distributee by will, as though the testator (in whose stead the executor is acting) had himself made the purchase and passed the property on under his will. But once the administration is completed and certain property has been distributed to the legatees pursuant to the will's terms, the basic testamentary disposition has been effected. Subsequent dealings in the property by a distributee who holds in trust for another involve no testamentary disposition; a subsequent purchase out of the funds of the legacy involves only a transaction for profit entered into by one acting as trustee for another. We submit that the beneficiary who receives property so purchased cannot be said to have acquired it by will within the meaning of Section 113 (a) (5) of the 1928 Act.

It seems unlikely that Congress intended on the one hand to treat property purchased by inter vivos trustees and distributed to the beneficiary as taking the usual cost basis in the beneficiary's hands, and on the other hand to deal with property purchased by testamentary trustees under the special exception to the cost basis rule found in subsection (5) of Section 113 (a). Yet it is reasonably clear that Congress did intend to use cost basis for property purchased by inter vivos trustees, since the exceptions to the cost basis rule found in subsections (2) and (3) of Sec. 113 (a) could not sensibly be

applied to property so purchased. They provide for use of the basis of the donor or transferor; but purchased property never had such a basis. As has been pointed out, subsections (2) and (3) are substantially identical with provisions found in all of the Revenue Acts from 1924 onwards. Beginning in 1934 the Treasury Regulations have expressly provided that property purchased by an inter vivos trustee takes the trustee's cost as basis in the beneficiary's hands.[13] Subsections (2) and (3) speak of property acquired by "gift" and "transfer in trust" while subsection (5) speaks of property acquired by "will." The language and subject matter are very similar. We submit that if property purchased by inter vivos trustees is not acquired by gift or transfer in trust under subsections (2) and (3), it is not acquired by will under subsection (5).

As has already been seen, the revenue acts other than those for 1928 and 1932 provide that the basis for property "acquired by bequest, devise, or inheritance," shall be its value at the time of acquisition. The words "acquired either by will or by intestacy" in the 1928 and 1932 Acts should, so far as possible, be given the same meaning as the phrase "acquired by bequest, devise, or inheritance" in the other acts. And we think it is clear that the phrase employed in the other acts does not

[13] Treasury Regulations 86, 94, and 101, Arts. 113 (a) (2)-1 (d), 113 (a) (3)-1 (c); Treasury Regulations 103, Secs. 19.113 (a) (2)-1 (d), 113 (a) (3)-1 (c).

embrace property purchased by executors or trustees. The basis under these acts is the fair market value thereof at the date of acquisition. And the Senate and House Committees said, in conforming the 1934 Act to the 1926 Act in this respect,

> the Supreme Court has defined "the date of acquisition" to mean the date of death in the case of all property passing by bequest, devise, and inheritance, whether real or personal. (*Brewster* v. *Gage*, 280 U. S. 327.) [14]

Though *Brewster* v. *Gage* dealt with a residuary legatee, a number of circuit courts of appeals have given the doctrine of that case its logical application to a remainderman who takes property following a testamentary trust; those courts have held that the remainderman acquires at the decedent's death property passing to him from the decedent through the testamentary trust.[15] This interpretation effectuates the obvious intention of Congress that there shall be no gap in the continuity of basis following the decedent's death—that no increments in the value of property accruing after

[14] Report of Senate Finance Committee, S. Rep. No. 558, 73d Cong., 2d Sess., pp. 34–35; Report of House Ways and Means Committee, H. Rep. No. 704, 73d Cong., 2d Sess., p. 28.

[15] *Chandler* v. *Field*, 63 F. (2d) 13 (C. C. A. 1st), certiorari denied, 289 U. S. 758; *Warner* v. *Commissioner*, 72 F. (2d) 225 (C. C. A. 2d), certiorari denied, 293 U. S. 620; *Roebling* v. *Commissioner*, 78 F. (2d) 444 (C. C. A. 3d); *Beers* v. *Commissioner*, 78 F. (2d) 447 (C. C. A. 3d), certiorari denied, 296 U. S. 620; *Molter* v. *Commissioner*, 69 F. (2d) 7 (C. C. A.

that date shall go untaxed under the terms of the statutory provision in question as it was written in the Acts of 1926 and before, and 1934 and thereafter.

If these decisions are correct, it cannot reasonably be concluded that that property "acquired by bequest, devise, or inheritance," includes property purchased by testamentary trustees. For if it did, time of acquisition would necessarily refer either to the date of purchase by the trustees, or the date of termination of the trust and transfer of the property by the trustees to the beneficiary. To use the first date would be consistent with the rule that the beneficiary's acquisition of property owned by the decedent at his death relates back to death, but would result in using a basis of fair market value at the moment of purchase, instead of the more logical cost basis. There is no reason to believe that Congress intended to leave out of tax account advantages or disadvantages inhering in the purchase itself. On the other hand, to use the date of termination of the trust would be incon-

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7th); *Hopkins* v. *Commissioner*, 69 F. (2d) 11 (C. C. A. 7th), certiorari denied, 293 U. S. 560; *Huggett* v. *Burnet*, 64 F. (2d) 705 (App. D. C.). A few cases, which we contend to be unsound in our brief in the *Gambrill* and related cases, Nos. 472–475, hold that a contingent remainderman does not acquire until his remainder vests. *Pringle* v. *Commissioner*, 64 F. (2d) 863 (C. C. A. 9th), certiorari denied, 290 U. S. 656; *Forbes* v. *Commissioner*, 82 F. (2d) 204 (C. C. A. 1st); *Reynolds* v. *Commissioner*, 114 F. (2d) 804 (C. C. A. 4th), pending on petition for certiorari, No. 684, this Term.

sistent with the rule applicable to property owned by the decedent at his death and passed to the beneficiary through the trust, since it would exempt from tax effect gains or losses in value accruing during the period between purchase and transfer to the beneficiary.

The answer, we submit, is that the provision relating to property acquired by bequest, devise or inheritance, found in all of the acts except those of 1928 and 1932, does not apply to property purchased by testamentary trustees. Property so purchased is acquired by the beneficiary by purchase, and its basis in his hands is the trustees' cost. Since 1934 the Treasury Regulations have expressly so provided. Article 113 (a) (5)–1 (d) of Treasury Regulations 86, 94, and 101, promulgated under the Revenue Acts of 1934, 1936, and 1938, respectively; Section 19.113 (a) (5)–1 (d) of Treasury Regulations 103, promulgated under the Internal Revenue Code.

In *Reynolds* v. *Commissioner,* 114 F. (2d) 804 (C. C. A. 4th), pending on petition for certiorari, No. 684, this Term, the court remarked that if Section 113 (a) (5) of the 1934 Act did not apply to a fiduciary's purchase, then no statutory provision was applicable. On the contrary, the applicable provision is the ordinary rule laid down in Section 113 (a) that "The basis for determining the gain or loss from the sale or other disposition of property shall be the cost of such property; * * *." Property purchased by a fiduciary comes within this provision. It does not require that the basis

shall be the cost to the particular taxpayer who sells the property. But even if it did, it would be fair to assume that the price paid by the fiduciary out of the estate held for the benefit of the taxpayer was cost to the taxpayer. Article 113 (a) (5)–1 (d) of Treasury Regulations 86, which reaches this result, is certainly valid (*Helvering* v. *Winmill,* 305 U. S. 79), and, we submit, represents the correct interpretation of earlier as well as later acts.[16]

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[16] In the *Reynolds* case the court interpreted Article 113 (a) (5)–1 (d) of Treasury Regulations 86 as applicable only to purchases by fiduciaries acting for decedents who died before March 1, 1913. Even a casual examination of this regulation shows that this construction does violence to both its form and purpose. It reads:

"ART. 113 (a) (5)–1. *Basis of property acquired by bequest, devise, or inheritance.*—* * *

* * * * * * * * *

"(d) *Property acquired before March 1, 1913; reinvestments by fiduciary.*—If the decedent died before March 1, 1913, the fair market value on that date is taken in lieu of the fair market value on the date of death, but only to the same extent and for the same purposes as the fair market value on March 1, 1913, is taken under section 113 (a) (14).

"If the property is an investment by the fiduciary under a will (as, for example, in the case of a sale by a fiduciary under a will of property transmitted from the decedent, and the reinvestment of the proceeds), the cost or other basis to the fiduciary is taken in lieu of the fair market value at the time when the decedent died."

The second paragraph of the regulation covers all purchases by testamentary fiduciaries without regard to the date of the decedent's death, and was not intended to be limited by the first. The Fourth Circuit's construction is also out of harmony with related Articles 113 (a) (2)–1 (d) and 113 (a) (3)–1 (c).

We therefore submit that the phrase "acquired by bequest, devise, or inheritance" employed in the acts other than those of 1928 and 1932 does not encompass purchases either by executors or testamentary trustees. While the words "acquired either by will or by intestacy" would not ordinarily bear a different construction, the legislative history of the 1928 Act requires, as we have already acknowledged, that the words just quoted be interpreted to cover purchases by executors. But in the interest of harmony with the other acts, as well as for the reasons already given, the words in question should not be extended to include purchases by trustees.

The decision of this Court in *Lyeth* v. *Hoey*, 305 U. S. 188, cited by the taxpayers (Br. 28–29) is not inconsistent with our position. There this Court held that a taxpayer who succeeded in obtaining a share of the decedent's estate by compromise of a suit to break the will acquired that share "by inheritance" within the meaning of the exempting provision. Since the taxpayer occupied the position of an heir in the sense that he would have received a share of the estate if the decedent had died intestate, the property he received was treated as though it had come to him by inheritance in the course of the regular administration of the estate without the compromise. The Court did not consider the question here presented.

The only cases in which the circuit courts of appeals have constructed Section 113 (a) (5) of the

1928 and 1932 Acts in its application to fiduciaries' purchases are the instant case, in which purchases by testamentary trustees were involved [17] and in which the Government's contentions were upheld by the Circuit Court of Appeals for the Seventh Circuit, and the decision to the contrary by the Circuit Court of Appeals for the Second Circuit in *Commissioner* v. *Gambrill,* 112 F. (2d) 530, and related cases, now pending before this Court on writ of certiorari, Nos. 472–475, this Term, in which subdivision (5) was held to be applicable both to property purchased by executors and to property purchased by testamentary trustees, and delivered in kind to the taxpayers.

CONCLUSION

We submit that the decision below is correct, both in holding that under Section 113 (a) (5) of the 1928 Act the basis for the decedent's property which came to petitioner through the testamentary trust is its value at the time of distribution by the decedent's estate to the trustees, rather than its value at the time of delivery by the trustees to petitioner, and in holding that subdivision (5) is inapplicable to the purchases by the testamentary trustees. If this Court agrees with us, the decision

[17] Petitioner's brief (p. 25) speaks as though there had been purchases by the executors in the instant case. No such purchases are revealed by the record. Cf. R. 16–17, 33–34, 38.

below should be affirmed. If it disagrees with us on both points the decision below should be reversed and that of the Board of Tax Appeals affirmed. In the event that it is held that the court below is wrong on either ground and right on the other, a remand to the Board will be necessary to permit the deficiency to be determined by agreement of the parties or otherwise.

Respectfully submitted.

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APPENDIX A

Revenue Act of 1928, c. 852, 45 Stat. 791, 818:

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(2) *Gift after December 31, 1920.*—If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the fair market value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information that the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner;

(3) *Transfer in trust after December 31, 1920.*—If the property was acquired after December 31, 1920, by a transfer in trust

(other than by a transfer in trust by a bequest or devise) the basis shall be the same as it would be in the hands of the grantor, increased in the amount of gain or decreased in the amount of loss recognized to the grantor upon such transfer under the law applicable to the year in which the transfer was made;

(4) *Gift or transfer in trust before January 1, 1921.*—If the property was acquired by gift or transfer in trust on or before December 31, 1920, the basis shall be the fair market value of such property at the time of such acquisition. The provisions of this paragraph shall apply to the acquisition of such property interests as are specified in section 402 (e) of the Revenue Act of 1921, or in section 302 (f) of the Revenue Act of 1924 or the Revenue Act of 1926 (relating to property passing under power of appointment) regardless of the time of acquisition;

(5) *Property transmitted at death.*—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times

prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death;

* * * * *

(b) *Property acquired before March 1, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be:

(1) the cost of such property (or, in the case of such property as is described in subsection (a) (1), (4), (5), or (12) of this section, the basis as therein provided), or

(2) the fair market value of such property as of March 1, 1913,

whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

ART. 591. *Basis for determining gain or loss from sale.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, is, in general, the cost of such property. This general rule is, however, subject to the exceptions set forth in section 113 and articles 592-604. The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, is (1) the cost

of such property (or, in the case of such property as is described in paragraphs (1), (4), and (5) of section 113 (a) and articles 592, 595, and 596, the basis therein provided); or (2) the fair market value of such property as of March 1, 1913; whichever is greater.

* * * * *

ART. 596. *Property transmitted at death.*— In the following cases the basis for determining gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the fair market value of the property at the time of the death of the decedent:

(1) Personal property acquired by specific bequest;

(2) Real property acquired by general or specific devise or by intestacy; and

(3) Property, whether real or personal, in the hands of a decedent's estate, acquired by the estate from the decedent (see article 863).

In all other cases where property was acquired either by will or by intestacy after February 28, 1913, the basis shall be the fair market value of the property at the time of its distribution to the taxpayer.

* * * * *

If the property was acquired prior to March 1, 1913, the gain or loss from the sale or other disposition thereof shall be computed upon the basis provided in section 113 (b) and article 591.

For the purposes of this article, the value of property as appraised for the purpose of the Federal estate tax or in the case of estates not subject to that tax, its value as appraised in the State court for the purpose of State inheritance taxes shall be deemed

to be its fair market value at the time of the death of the decedent.

APPENDIX B

S. Rep. No. 960, 70th Cong., 1st Sess., pp. 26–27:

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS—EXECUTORS' SALE.

The decision by the Court of Claims in *McKinney* v. *United States* has caused confusion in the existing law as to the basis on which an executor must determine gain or loss on the sale by him of property of the estate. The House bill in section 113 (a) (5) provides that in such cases the basis shall be the fair market value of the property at the time of the death of the decedent. In the same section the House bill provides the same basis shall be used where the property is sold by the beneficiary.

It appears that the House bill is inadequate to take care of a number of situations which frequently arise. For example, the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis for determining subsequent gain or loss, for the decedent never owned the property. Moreover, the fair market value of the property at the decedent's death cannot properly be used as the basis, in the case of property transferred in contemplation of death where the donee sells the property while the donor is living.

Accordingly, the committee has revised section 113 (a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmis-

sion of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary.

Section 113 (a) (4) is amended so as to provide that the basis in the case of property passing under power of appointment, regardless of the time of acquisition, shall be the fair market value on the date of acquisition, which is the rule of the present law and of the House bill.

Section 113 (a) (3) is amended by striking out the last sentence of the House bill, with the effect of including within the paragraph all classes of transfers in trust made after December 31, 1920 (even if made in contemplation of death or to take effect in possession or enjoyment at or after death). The basis thus provided is the basis the property would have in the hands of the grantor, adjusted for gain or loss recognized to the grantor when the transfer was made.

The effect of striking out the last sentence of section 113 (a) (3) is also to make the basis in the case of gifts in contemplation of death or to take effect in possession or enjoyment at or after death, if made after December 31, 1920, the same as the basis which the property would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift.

H. Conference Rep. No. 1882, 70th Cong., 1st Sess., p. 14:

Section 113 (a) (5) is amended (No. 75) so as to provide that in the case of specific bequest of personalty or a general or specific devise of realty or the transmission of realty by intestacy the basis shall be the fair market value of the property at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest, or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary; * * *.

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